Supreme Court of the United States.

UNITED STATES v. ISAAC N. COOKE.

Where a statute defining an offence contains an exception in the enacting clause, which is so incorporated with the language defining the offence, that the ingredients of the offence cannot be fully set out without negativing the exception, an indictment must allege enough to show that the accused is not within the exception.

But if the exception is separable from the language of the enacting clause, and the offence can be fully and accurately defined without reference to it, the indictment is good without such reference.

An indictment charged the accused with the commission, more than two years previously, of certain acts amounting to an offence as defined by an Act of Congress; another act limited prosecutions for this and other offences to two years, unless the accused had been a fugitive from justice. On demurrer the indictment was held good, though it did not allege that the accused was within the exception.

ON a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of Ohio.

C. H. Hill, Assistant Attorney-General, for the United States.

Kebler and *Whitman*, for the defendant.

The opinion of the court was delivered by

CLIFFORD, J.—Officers and other persons charged with the safe-keeping, transfer and disbursement of the public moneys, are required by an Act of Congress to keep an accurate entry of each sum received, and of each payment or transfer; and the 16th section of the same act provides that if any one of the said officers shall convert to his own use, in any way whatever, any portion of the public moneys intrusted to him for safe-keeping, disbursement or transfer, or for any other purpose, every such act shall be deemed and adjudged to be embezzlement of so much of the public moneys as shall be thus taken and converted, which is therein declared to be a felony; and the same section also provides that all persons advising or participating in such act, being convicted thereof before any court of the United States of competent jurisdiction, shall be punished as therein provided: 9 Stat. at Large 63.

Founded on that provision, the indictment in this case contained six counts, charging that the defendant, as paymaster in the army, had in his custody for safe-keeping and disbursement, a large sum of public money intrusted to him in his official character as an

additional paymaster in the army, and that he, on the respective days therein alleged, did unlawfully, knowingly and feloniously embezzle and convert the same to his own use. Such conversion is alleged in the first count, on the 1st of May 1862, in the second on the 6th of July, in the third on the 16th of October, in the fourth on the 12th of September, in the fifth on the 20th of September, and in the sixth on the 15th of November, all in the same year. Service was made, and the defendant appeared and demurred to the first five counts, showing for cause, that it appears on the face of the indictment, and by the allegations of the said several counts, that the crime charged against him was committed more than two years before the indictment was found, and filed in court.

Three questions were presented by the demurrer for the decision of the court, upon which the opinions of the judges were opposed, in substance and effect as follows: (1) Whether it was competent for the defendant to take exception, by demurrer, to the sufficiency of the first five counts of the indictment for the causes assigned. (2) Whether the said five counts, or either of them, allege or charge, upon their face, any crime or offence against the defendant for which he is liable in law to be put upon trial, convicted and punished. Both of those questions are presented in the record as one, but inasmuch as the answers to them must be different, it is more convenient to divide the question into two parts. (3) Whether the 32d section of the Crimes Act applies to the case, and limits the time within which an indictment must be found for such an offence: 1 Stat. at Large 119.

Forgery of public securities was made a capital felony by that act, as well as treason, piracy and murder, and the 32d section of the act provides that no person shall be prosecuted, tried or punished for treason or other capital felony, wilful murder or forgery excepted, unless the indictment for the same shall be found by the grand jury within three years next after the treason or capital offence shall be done or committed: 1 Stat. at Large 119.

Provision is also made by the succeeding clause of the same section, that no person shall be prosecuted, tried or punished for any offence, not capital, unless the indictment for the same shall be found within two years from the time of committing the offence. Fines and penalties, under any penal statute, were also included in the same limitation, but that part of the clause having been

superseded by a subsequent enactment, it is omitted: 5 Stat. at Large 322; *Stimpson* v. *Pond*, 2 Curt. 502.

Appended to the 32d section, enacting the limitation under consideration, is the following proviso: Provided, that nothing herein contained shall extend to any person or persons fleeing from justice: 1 Stat. at Large 119.

Where a statute defining an offence contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offence, that the ingredients of the offence cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offence is so entirely separable from the exception, that the ingredients constituting the offence may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defence and must be shown by the accused: *Steel* v. *Smith*, 1 Barn. & Ald. 99; Arch. Crim. Plead., 15th ed., 54. Offences created by statute, as well as offences at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offence, it is clear that no indictment founded upon the statute can be a good one, which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offence is composed: *Rex* v. *Mason*, 2 Term R. 581.

With rare exceptions, offences consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error: Arch. Plea. Cr. Cas., 15th ed., 54.

Text writers and courts of justice have sometimes said, that if the exception is in the enacting clause, the party pleading must show that the accused is not within the exception, but where the exception is in a subsequent section or statute, that the matter contained in the exception is matter of defence, and must be shown by the accused. Undoubtedly that rule will frequently hold good,

and in many cases prove to be a safe guide in pleading, but it is clear that it is not a universal criterion, as the words of the statute defining the offence may be so entirely separable from the exception, that all the ingredients constituting the offence may be accurately and clearly alleged without any reference to the exception: *Commonwealth* v. *Hart*, 11 Cush. 132.

Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is nevertheless clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offence that it would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty: *State* v. *Abbey*, 29 Vermont 66; 1 Bishop Crim. Proceed., 2d ed., sec. 639, n. 3.

Support to these views is found in many cases where the precise point was well considered. Much consideration was given to the subject in the case of *Com.* v. *Hart*, 11 Cush. 130, where it is said that the rule of pleading a statute which contains an exception is the same as that applied in pleading a private instrument of contract, that if such an instrument contains in it, first, a general clause, and afterwards a separate and distinct clause which has the effect of taking out of the general clause something that otherwise would be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception, but *if the exception itself is incorporated in the general clause*, then the party relying on "the general clause, must in pleading state the general clause together with the exception," which appears to be correct, but the reasons assigned for the alternative branch of the rule are not quite satisfactory, as they appear to overlook the important fact in the supposed case that the exception itself is supposed to be incorporated in the general clause.

Where the exception itself is incorporated in the general clause, as is supposed in the alternative rule there laid down, then it is correct to say, whether speaking of a statute or private contract,

that unless the exception in the general clause is negatived in pleading the clause, no offence, or no cause of action, will appear in the indictment or declaration when compared with the statute or contract, but when the exception or proviso is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated without negativing the exception or proviso, as a *primâ facie* case is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defence.

Commentators and judges have sometimes been led into error by supposing that the words "enacting clause," as frequently employed, mean the section of the statute defining the offence, as contradistinguished from a subsequent section in the same statute, which is a misapprehension of the term, as the only real question in the case is whether the exception is so incorporated with the substance of the clause defining the offence as to constitute a material part of the description of the acts, omission or other ingredients which constitute the offence. Such an offence must be accurately and clearly described, and if the exception is so incorporated with the clause describing the offence that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but if it is not so incorporated with the clause defining the offence as to become a material part of the definition of the offence, then it is matter of defence and must be shown by the other party, though it be in the same section or even in the succeeding sentence: 2 Lead. Crim. Cas., 2d ed. 12; *Vavasour* v. *Ormrod*, 9 D. & R. 599; *Spieres* v. *Parker*, 1 Term 141; *Commonwealth* v. *Bean*, 14 Gray 53; 1 Stark. Crim. Plead. 246.

Both branches of the rule are correctly stated in the case of *Steel* v. *Smith*, 1 B. & Ald. 99, which was a suit for a penalty, and may perhaps be regarded as the leading case upon the subject. Separate opinions were given by the judges, but they were unanimous in the conclusion, which is stated as follows by the reporter: Where an Act of Parliament in the enacting clause creates an offence and gives a penalty, and in the same section there follows a proviso containing an exception *which is not incorporated in the enacting clause by any words of reference*, it is not necessary for the plaintiff in suing for the penalty to negative such proviso in his declaration.

All of the judges concurred in that view, and BAYLEY, J., re-

marked that where there is an exception so incorporated with the enacting clause that the one cannot be read without the other, there the exception must be negatived.

Doubtless there is a technical distinction between an exception and a proviso, as an exception ought to be of that which would otherwise be included in the category from which it is excepted, and the office of a proviso is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some ground of misinterpretation of it, as extending to cases not intended to be brought within its operation, but there are a great many examples where the distinction is disregarded and where the words are used as if they were of the same signification: *Gurly* v. *Gurly*, 8 Cl. & Fin. 764; *Minis v. United States*, 15 Pet. 445; Stephen on Plead., 9th Am. ed. 443.

Few better guides upon the general subject can be found than the one given at a very early period by TREBY, Ch. J., in *Jones* v. *Axen*, 1 Ld. Raym. 120, in which he said, the difference is that where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception, but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to show the proviso; which is substantially the same rule in both its branches as that given at a much more recent period in the case of *Steel* v. *Smith*, which received the unanimous concurrence of the judges of the court by which it was promulgated.

Apply those rules to the case before the court and all difficulty is removed in answering the questions for decision. Neither an exception nor a proviso of any kind is contained in the Act of Congress defining the offence, and every ingredient of the offence therein defined is accurately and clearly described in the indictment. Nothing different is pretended by the defendant, but the contention is that the demurrer does not admit the force and effect of these allegations, because another Act of Congress provides that no person shall be prosecuted, tried, or convicted of the offence unless the indictment for the same shall be found within two years from the time of committing the offence.

Argument to show that a demurrer to an indictment admits every matter of fact which is well pleaded is unnecessary, as the proposition is not denied, and inasmuch as the offence is well

alleged in each of the counts to which the demurrer applies, it is difficult to see upon what ground it can be contended that the defendant may, by demurrer, set up the Statute of Limitations as a defence, it appearing beyond all doubt that the act defining the offence contains neither an exception nor a proviso of any kind.

Tested by the principles herein suggested, it is quite clear that such a theory cannot be supported, but it must be admitted that decided cases are referred to which not only countenance that view, but adjudge it to be correct. Some of the cases, however, admit that the judgment cannot be arrested for such a defect if it appears that the Statute of Limitations contains any exception, as the presumption in that state of the case would be that evidence was introduced at the trial which brought the defendant within some one of the exceptions: *State* v. *Hobbs*, 39 Me. 212; *People* v. *Santvoord*, 9 Cow. 660; *State* v. *Rust*, 8 Blackf. 195.

Obviously the supposed error, if it be one, could not be corrected by a motion in arrest, for the reason suggested in those cases, and it is quite as difficult to understand the reason of the rule which affirms that a demurrer will work any such result, as it cannot be admitted that a demurrer is a proper pleading where it will have the effect to shut out evidence properly admissible under the general issue to rebut the presumption of the supposed defect it was filed to correct.

Suppose that is so, then it clearly follows that the demurrer ought not to be sustained in this case, as the Statute of Limitations in question contains an exception, and it may be that the prosecutor, if the defendant is put to trial under the general issue, will be able to introduce evidence to show that he, the defendant, is within that exception. Although the reasons given for that conclusion appear to be persuasive and convincing, still it is true that there are decided cases which support the opposite rule, and which affirm that the prosecutor must so frame the indictment as to bring the offence within the period specified in the Statute of Limitations, or the defendant may demur, move in arrest of judgment or bring error: *State* v. *Bryan*, 19 La. An. 435; *U. S.* v. *Watkins*, 3 Cran. C. C. 550; *People* v. *Miller*, 12 Cal. 294; *McLane* v. *The State*, 4 Geo. 340.

Sometimes it is argued that the case of *Com.* v. *Ruffner*, 28 Penn. St. 260, and *Hatwood* v. *The State*, 18 Ind. 492, adopt the same rule, but it is clear that neither of those cases supports any

such proposition. Instead of that, they both decide that it is not necessary to plead the Statute of Limitations in criminal cases—that the defendant may give it in evidence under the general issue, which undoubtedly is correct, as it affords the prosecutor an opportunity where the statute contains exceptions, to introduce rebutting evidence, and bring the defendant within one of the exceptions.

Accused persons may avail themselves of the Statute of Limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indictment because it appears upon its face that it was not found within the period prescribed in the limitation, as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice, and was within the exception: *U. S.* v. *White*, 5 Cran. C. C. 60; *State* v. *Howard*, 15 Rich. (S. C.) 282; *State* v. *Hussey*, 7 Iowa 409.

Nor is it admitted that any different rule would apply in the case even if the Statute of Limitations did not contain any exception, as time is not of the essence of the offence; and also for the reason that the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have a right to do, under the general issue, to show that the offence was committed within two years next before the indictment was found and filed.

Examples are given by commentators which serve to illustrate the general doctrine even better than some judicial opinions. No mariner, it was enacted, who was serving on board any privateer employed in certain British colonies should be liable to be impressed unless it appeared that he had previously deserted from an English ship of war, and the act provided that any officer who should impress such a mariner should be liable to a penalty of fifty dollars. Judgment was arrested in an action brought for the penalty there imposed, because the declaration did not allege that the mariner had not previously deserted, as that circumstance entered into the very description of the offence, and constituted a part of the transaction made penal by the statute: *Spieres* v. *Parker*, 1 Term 141.

Labor and travelling on the Lord's day, except from necessity and charity, are forbidden in some states by statute, which also

furnishes an example where the exception is a constituent part of the offence, as it is not labor and travelling, merely, which are prohibited, but *unnecessary* labor and travelling, or labor and travelling *not required for charity*: *State* v. *Barker*, 18 Vermont 195.

Innkeepers are also prohibited by statute, in some jurisdictions, to entertain on the Lord's day, persons not lodgers in the inn, if resident in the town where the inn is kept, and an indictment founded on that statute was held to be bad, because it did not aver that the persons entertained were not lodgers, as it is clear that that circumstance was an ingredient of the offence: *Commonwealth* v. *Tuck*, 20 Pick. 361.

So an English statute made it penal for any person, not employed in the public mint, to make or mend any instrument used for coining, and it was held that the indictment must negative the want of authority, as that clause was a part of the description of the offence: 1 East P. C. 167; 2 Lead. Crim. Cas., 2d ed. 9.

Equally instructive examples are also given by commentators, to show that nothing of the kind is required where the exception is not incorporated with the clause defining the offence, nor connected with it in any manner by words of reference, as in such cases it is not a constituent part of the offence, but is a matter of defence and must be pleaded or given in evidence by the accused: 1 Bish. Crim. Proced., 2d ed., §§ 405, 632, 635, 639; *Steel* v. *Smith*, 1 B. & Ald. 99; *State* v. *Abbey*, 29 Vermont 66; 1 Am. Crim. Law, 6th ed., §§ 378, 379; 1 Wat. Arch. Crim. Prac., ed. 1860, 287; *Rex* v. *Pearce*, Russ. & Ryan C. C. 174; *Rex* v. *Robinson*, Ibid. 321; *Rex* v. *Baxter*, 2 East P. C. 781; s. c., 2 Leach C. C., 4th ed. 578; 1 Gabbet Crim. Law 283.

Sufficient has already been remarked to show what answer must be given to the first and second questions, which are both contained in the first interrogatory in the record, and it is only necessary to add in respect to the third, which is numbered second in the transcript, that the only Statute of Limitations applicable to the offence alleged in the indictment, is the one enacted in the thirty-second section of the original Crimes Act, which cannot, however, avail the defendant under the demurrer filed to the indictment.

Let the following answers be certified to the Circuit Court: (1) That it is not competent for the defendant to take exception by demurrer to the first five counts of the indictment, for the cause assigned. (2) That the said five counts, and each of them,

do allege and charge upon their face a crime or offence against the defendant, for which he is liable in law, to be put upon trial, convicted and punished. (3) That the thirty-second section of the Crimes Act enacts the only Statute of Limitation, applicable to the offence charged against the defendant, but that he cannot avail himself of it under the demurrer filed to the indictment.

The second of the three points held by the court in the above case being very thoroughly treated in the notes to *Commonwealth* v. *Hart*, 1 Lead. Crim. Cas. 250, and the third point being one not calling for discussion, it is proposed to collect and comment upon the authorities relevant to the first point. To state the principles which rule the question before us more clearly and briefly than has been done by the learned judge who delivered the opinion of the court would scarcely be possible, but to an understanding of the cases it is necessary to consider the elementary laws of pleading, which govern the matter of the statement for instance, in an indictment, of the time of an offence committed, and what special rules apply to the Statute of Limitations in this connection.

We have then first this doctrine, namely: That the time laid in an indictment should be before action brought. And this, in general, is the sole requirement: *Lee* v. *Clark*, 2 East 233; Gil. Ev. 265; East P. C., c. II. § 60, p. 124, with cases cited; 2 Co. Inst. 318; *Syers's Case*, 3 Mod. 230. In one case further particularity is demanded, that viz. where time is of the essence of the crime, e. g. night in the case of burglary, &c., vide the example given *post* 695. That the time of an embezzlement is not, unless made so by the Statute of Limitations, of the essence of the offence, will not be argued; this exception, therefore, may for the present be ignored.

Up to this point it is clear that we have no reason for regarding the indictment in the principal case as demurrable, but the question now arises whether the Statute of Limitations does not introduce a new requisite, that, namely, the time laid should be within its period; and here it is pertinent to consider the different rules relating to the Statute which obtain respectively in civil and criminal pleading. For an intelligent comprehension of this difference and the true reason for it will show, it is believed, the entire correctness of the decision in the case before us. The Statute of Limitations then, in civil cases being required to be specially pleaded (*Brown* v. *Hancock*, Cro. Car. 115; 1 Wm. Saund. 159, with authorities; *Sherwin* v. *Cartwright*, Hutt. 109; Angell on Limitations, § 300; *Thursby* v. *Warren*, Cro. Car. 160; being the early cases on the point, and lastly *Trankersly* v. *Robinson*, Cro. Car. 163, in which the law as it now is was first settled), while in criminal ones it may be given in evidence under the general issue, it seems to have been thought by some that though a declaration in a civil suit was not demurrable for alleging a time beyond the period of limitation, because on a plea of the statute the plaintiff might have brought his case within one of the exceptions, or shown an acknowledgment, yet that the case was the reverse with an indictment. And the strongest argument which we may ascribe to those who take this view, is perhaps to this effect. That the rule of criminal pleading permitting the statute to be given in evidence under the general issue was based upon the principle that its committal within the statutory period was so far of the *essence* of a crime that

this must be shown by the prosecutor; that it was not as in civil cases necessary for the defendant to assume the burden of alleging and proving the contrary, and that an indictment which failed to make this allegation was demurrable. Besides this precise and comprehensible reason for holding a prosecutor to a careful statement of his case, there are to be found many vague assertions as to "the greater strictness" of criminal pleadings, &c., but these we may say here are, without more, of the very slightest consequence, and call for no notice. This is as far as we are able to give it a fair presentation of one side of the controversy. (Vide *infra*, *United States* v. *Watkins*, for arguments excellent if the question were *res integra*, but which prove too much in being applicable to civil as to criminal pleading, though perhaps not to the same degree; and *McLane* v. *State of Georgia*, 4 Ga. 333.) On the other hand. Having found that time was not in general required to be accurately stated or proved as stated; and knowing that in civil cases a date in the declaration beyond the statutory period is not ground of demurrer, the statute being required to be specially pleaded, the question before us is whether the difference between the time of the formation of a contract and that of the perpetration of a crime as affecting the essence of each is so wide that in the latter case we must hold that the general rule as to the pleading of time cannot apply. It may be taken to be admitted that the provisions of the Act of Limitations do not form an exception or proviso to the act defining the crime, to take the case before us, and that it is not necessary to the completeness of the offence that it should have been committed within the statutory period, in the same sense that it is necessary to the crime of burglary that it should have been committed in the night.

Towards the resolution of this question it is now proposed, *First*, to cite some explanations which have been given of the difference between civil and criminal pleading in regard to the Statute of Limitations, and to argue that the natural difference between a crime and a contract is sufficiently recognised by releasing in criminal cases the rule requiring the defendant to plead specially the statute, without going on to compel the prosecutor in his indictment to negative this by anticipation; and that there is no occasion to make an exception to the general rule applicable alike to civil and criminal pleading, (*vide ante*, p. 691; *Spicer* v. *Matthews*, Fortesque 375;) which allows the pleader to depart in his pleading and vary in his proof from the time first alleged.

Secondly, to examine more fully than is done in the original case the authorities, which have been cited against the ruling therein.

Under the first head comes the following from 1 Wms. Saund. 162: "Perhaps the true ground of distinction between the Statute of Limitations and Stat. 31 Eliz. and other statutes limiting *penal* actions to a definite period may be this: the former statute limits those actions where a debt or other cause of action is already vested in the plaintiff by means of some contract or other transaction between the plaintiff and defendant prior to the bringing of the action, but in penal actions the duty or right of action attaches in the plaintiff merely by bringing the action, and did not exist in him before, and unless he brings his action within the time prescribed there is no right of action attached in him, therefore he seems as much bound to *prove* the commencement of his action within time, which is the cause or consideration of it, in order to entitle himself to a verdict, as a person who brings assumpsit or debt for goods sold and delivered or money lent, and the like, is to show the cause or consideration of his action to entitle him to a

verdict, and if he fails therein it appears that he has no cause of action. But the Statute of Limitations (meaning that applying to civil actions) "admits the cause or consideration of the action still existing and merely discharges the defendant from the remedy, so that a promise within six years, without any other consideration, is sufficient to revive the action; therefore, if he will take advantage of that circumstance it is necessary he should plead the statute: 5 Burr. 260; *Quantock* v. *England*, 3 T. 11, per BULLER, J., in *Petrie* v. *White*. If any distinction is to be taken between penal actions (the example given by Williams) and criminal prosecutions, it will be to the effect that though the right to the penalty does not exist till suit brought, a crime has an independent being, and is a crime, though no prosecution be ever brought. Thus classing a prosecution rather with an action on a contract, if we follow Williams's line of thought. The rule of pleading, however, which permits the the Statute of Limitations to be given in evidence under the general issue as well in prosecutions as in penal actions, shows it is believed that no such distinction exists, and *mutatis mutandis* for "penal actions," "prosecutions" might be substituted in the above passage without affecting its integrity. See also in last edition note by Sir E. V. Williams.

Says Williams (Wms. Saund. 159): "In all other cases except such as are founded on these Statutes (*i. e.*, 21 Jac. 1, c. 5 and 32 H. 8, c. 2, relating to civil suits) of Limitations, where an action is required by statute to be commenced within a limited time, it is the duty of the plaintiff to *prove* that he has complied with the terms of it, and if he do not he will fail in his suit."

The above italics are ours; it will be noticed that the word "prove" is used twice, and nothing is said about the *allegation* of time. See further *Stile* v. *Finch*, Cro. Car. 404; *Lee* v. *Rogers*, 1 Levinz 110; Willkinson on Limitation of Actions 105; *Gould* v. *Johnson*, 2 Salk. 422–3. In this connection the case of *Rex* v. *Treharne*, 10 Mood. C. C. 298, is of interest. Prisoner indicted for forgery committed July 2d 1830. The statute authorizing trial of the offence in the county where prosecution was in fact brought did not go into operation till 20th July. BOLLAND, B., left it to the jury if they were satisfied that the prisoner had committed the forgery to say whether it was before or after 20th July. Jury found that it was after. Counsel moved in arrest of judgment that indictment on its face showed there was no jurisdiction in court and cited *Rex* v. *Napper*, 1 Mood. C. C. 44, (not relevant to our present discussion), and *Rex* v. *Brown*, M. & M. 163, (of which more hereafter). This case was considered at a meeting of all the judges (except PARK, J., VAUGHAN, B., and TAUNTON, J.,) in Easter Term 1831, and they were unanimously of the opinion that as the forgery was the same offence before 20th July 1830 as afterwards, and the statute only entitled the prosecutor to charge in that county what before he must have charged in another, but made no provision for varying the charge or introducing any additional statement; whatever charge would before the statute have been sufficient in the county in which the offence must have been then laid will be sufficient in the county in which trial is laid, and the conviction was therefore approved.

Secondly. The following authorities have been cited against the doctrine laid down in the principal case:

1. Wharton's American Criminal Law § 436; citing *United States* v. *Watkins*, 3 Cr. C. C. 442; (which relies upon *Rex* v. *Fearnley*, 1 Term Rep. 320, *Rex* v. *Saunders*, 2 Strange 865 and *Pugh* v. *Robinson*, 1 Term 116). *United States* v. *White*, 5 Cr. 36, 60, 308; *Commonwealth* v. *Hutchinson*, 2 Pars. 453; (over-

ruled by *Commonwealth* v. *Ruffner*, 28 Penna. St. 453. Wharton, §§ 275–8, citing *Rex* v. *Brown*, M. & M. 163; *State* v. *McGrath*, 4 Bennett (Mo.) 378. Wharton, § 455, citing 28 Penn. St. 259; *State* v. *Robinson*, 9 Foster 374 (which relies on 4 Blackstone 306, citing Foster 249); *McLane* v. *State of Georgia*, 4 Geo. 333, (which relies upon Arch. Crim. P. & P.; Chitty's Crim. Law; *Rex* v. *Wheatley*, 2 Burr.; *State* v. *Beckwith*, 1 Stew. 318; *United States* v. *Watkins*, 3 Cr. C. C. 73; *Hubbard* v. *State*, 7 Ind. 160; *State* v. *Hussey*, 7 Iowa 409; and *Hatwood* v. *State*, 18 Ind. 492.

2. 1 Archbold Criminal Pleading and Practice, Waterman's notes, 278 n., citing *State* v. *Rust*, 8 Black. 195; *State* v. *Lassley*, 7 Porter (Ala.) 526; *State* v. *G. S.*, 1 Tyler 275; *State* v. *Roach*, 2 Hay. 526; *Erwin* v. *State*, 13 Miss. 306; *Cook* v. *State*, 11 Geo. 53; *Hubbard* v. *State*, 7 Porter 160; *Roberts* v. *State*, 19 Ala. 521; *Shelton* v. *State*, 1 Stew. & Port. 208; *State* v. *Bacon*, 7 Vt. 219; *State* v. *Baker*, 34 Me. 52.

3. *People* v. *Miller*, 12 Cal. 294, citing Wharton's American Crim. Law; *State* v. *Beckwith*, 1 Stew. 318; *Shelton* v. *State*, 1 Stew. & Por. 208; *State* v. *Roach*, 1 How. Miss. Rep; Chitty Crim. Law.

4. *People* v. *Bryan*, 19 La. Ann., citing two cases in the same state.

5. Chitty's Criminal Law; citing Gilb. Ev. 243; 2 East 333, 362; 5 East 259; 1 Saund. 309 n.; 5 Fitzg. 136; Bac. Abr. *Usury* K.

6. Starkie on Criminal Plead., ed. of 1828, p. 59, has precisely the same passage as 1 Chitty 223, word for word, and relies on *King* v. *Stevens*, 5 East 259, for which *vide infra*.

1. Wharton's Amer. Crim. L. § 436. The Statute of Limitations may be specially pleaded, or it may be taken advantage of either by *demurrer* or on the general issue: *U. S.* v. *Watkins*, 9 Cr. C. C. 442; *U. S.* v. *White*, 5 Cr. 38, 60, 308; *Com'th* v. *Hutchinson*, 2 Pars. 453, overruled by *Com'th* v. *Ruffner*, 28 Pa. St. 259.

U. S. v. *Watkins* is a case full upon the point, one of the few among the array marshalled against the doctrine of the principal case, that are at all pertinent.

The facts were substantially the same as those of *U. S.* v. *Cooke*, and the demurrer was for a like reason. It was objected to the demurrer that advantage of the limitation cannot be taken by demurrer, because prosecutor would thereby be precluded from replying according to the proviso of the act that the defendant fled from justice within two years. To which the court replied per CRANCH, J.: "It has been said, that the United States would thereby be precluded from replying the flight of the defendant if such should have been the fact. But that is not the fault of the defendant; the United States have put themselves in that situation by stating the fact to have happened at a time beyond the day of limitation. They were not bound to do so, for they might have laid the day to be within the time of limitation, and have proved a different day at the trial; and if the day proved should be beyond the time of limitation, and the United States could have shown that the defendant fled within the two years after committing the offence, they might have given it in evidence or they might have stated in the indictment the true time and the facts which existed and went to show that the defendant could not avail himself of the limitation." Citing *King* v. *Fearnley*, 1 T. R. 320.

United States v. *White*, 5 Cr. C. C. 41. Motion to quash indictment, because statutory period had elapsed. Court refused to quash indictment, because until the facts shall appear upon the trial, it cannot appear that the defendant was not a person fleeing from justice, and therefore not entitled to the benefit of the

limitation of time, and if he is entitled to its benefit he may have it upon the plea or upon evidence under the general issue.

Commonwealth v. *Hutchinson*, 2 Pars. 45, was an authority only for the position that the Statute of Limitations must be specially pleaded in criminal cases, and has since been overruled.

Wharton, §§ 275–8. "Where a time is limited" (giving cases where a more precise date must be laid) "for preferring an indictment, time laid should appear to be within time so limited: *Rex* v. *Brown*, M. & M. 163; *State* v. *McGrath*, 19 Mis. (4 Ben.) 378. To these may be added cases where date is essential under the Statute of Limitations."

The first part of the above clause (taken from Archbold Crim. P. & P.) is not very happily expressed, and though from the after-remark evidently not intended to refer to the Statute of Limitations, is properly susceptible of no other meaning. We must, however, take it to describe that class of cases where time is of the essence, where an act done at one time is no offence, at another is a crime; as breaking the Sabbath, burglary, or take the example which the author cites —*Rex* v. *Brown*—which was an indictment under a statute making it penal to signal to smugglers during the night-time between September 21st and April 1st. Time laid was 8th March. Objection taken that indictment did not expressly say, between 21st September and 1st April. Motion in arrest of judgment refused. *State* v. *McGrath* contains a dictum which is as follows: says RYLAND, J., "It is not important as to what day is alleged or what day is proved so that the time in the indictment is within the period prescribed for limiting the prosecution and the proof is of a day before the finding of the bill of indictment by the grand jury, and within the period prescribed for limitation." A careless statement on its face, for, to make no other criticism, it neglects to say that the time *alleged* must be before indictment brought.

Wharton, § 455. "The Statute of Limitations (28 Penna. St. 259) may be taken advantage of on the general issue, *or when it appears on the record* by motion in arrest of judgment, or on motion to quash." The difference between a motion in arrest of judgment and a demurrer in this connection is so obvious as scarcely to require comment, but it may be said that some of the English cases hold that a time in indictment laid beyond the statutory period is not a reason for arresting judgment upon a general verdict, the court going so far as to presume that, though a time beyond the statute is alleged, a time within must have been proved: (*Lee* v. *Clark*, 2 East 333.) And *Com'th* v. *Ruffner*, 28 Pa. St. 259, holds perfectly consistently with English authority that on a *special* verdict finding the offence to have been committed at a date beyond the statutory period, judgment must be entered for defendant though the statute was not pleaded. The learned judge lays some emphasis on the fact of the inconsistency between indictment laying date within statutory period and verdict finding date without that limit, the verdict not showing that the defendant was guilty "in manner and form as he stood indicted." But it is submitted that the verdict in criminal cases is everything and in general the allegation of time nothing; that this discrepancy, therefore, is not important, and that the judgment should go according to the verdict. In all other respects the decision is entirely in accordance with the older law.

State v. *Robinson*, 9 Foster 274—motion to quash. "Now it is an established law of criminal pleading that where the time when an act charged was done, is material either as constituting an element of the crime, or as affording to the accused a bar to the pro-

ceeding, it must be accurately stated, and a variance between allegation and proof is fatal. The rule has been illustrated by reference to Stat. 7 Wm. III." (in this statute there are no exceptions: *vide infra*), "limiting to three years prosecutions for certain acts of treason: 4 Blacks. Com. 306;" (says BLACKSTONE, "but sometimes the time may be very material, where there is any situation in point of time assigned for the prosecution of offenders, as by the Stat. 7 Wm. III. c. 3, &c." Refers to Foster 249, which is merely a citation of Stat. 7 Wm. III.) On this precise ground the time when crime was charged in the indictment to have been committed, is material, and on trial must be shown in proof, but not being proved as alleged, the defendant "must be acquitted." This case seems to support Judge LEWIS'S position in *Com'th* v. *Ruffner*.

McLane v. *State of Georgia*, 4 Ga. 333: Motion in arrest of judgment: "That the indictment showed upon its face, that it was barred by the Statute of Limitations, and did not show anything by which the effect of the statute could be avoided." The court was asked to presume that it was proved on the trial that the defendant was within one of the exceptions to the statute. This the court refused to do, giving as authority *Rex* v. *Wheatly*, 2 Burr. 1127, (motion in arrest of judgment. Indictment was for selling short measure of beer, held not to be indictable offence as described in indictment, and Ld. MANSFIELD, in his opinion, says: "In a criminal charge there is no latitude of intention to include anything more than is charged; the charge must be explicit enough to support itself"); and went on to say that where a time is limited for preferring an indictment, the time laid should appear to be within the time so limited: citing Arch. Crim. P. & P. 14; *vide infra*, p. 697; Chitty Cr. Law 223; *vide infra*, p. 698; and *State* v. *Beckwith*, 1 Stew. 318. (Indict. found October 1826. Date —— day of —— 1826—motion in arrest of judgment. Statute of Limitations was six months for one count, and a year (or more) for another; says SAFFOLD, J.: "One entire year could not have elapsed, but the doctrine is that whenever the time is any way material it must be averred, the indictment will be vitiated by a repugnancy as to time, &c." This is a case of defective statement, and clearly bad, and would have been so, if the Statute of Limitations had never existed.) "On the score of principle," the court in *McLane* v. *The State of Georgia*, go on to say, "we think that it was incumbent on the prosecuting officer to have alleged in the indictment the particular exception on which he relied to prevent the operation of the statute, so it might affirmatively appear that the defendant was liable under the law to be arrested, tried and convicted for the offence, and for the further reason that he might be prepared at the trial to traverse all the material allegations made by the state against him." And the court was unwilling to apply to criminal cases the rule in civil cases.

U. S. v. *Watkins*, *vide supra* 694.

Hubbard v. *State*, 7 Ind. 160, contains a dictum to the effect that where indictment may be barred by lapse of time, alleged date should be within the period allowed.

Hatwood v. *State*, 18 Ind. 492, Statute of Limitations may be proved under the general issue in criminal cases.

State v. *Hussey*, 7 Iowa 409, is to the effect that the Statute of Limitations in criminal cases is not subject of demurrer, because there might be an exception, and the exception need not be stated in indictment.

2. Archbold Crim. Plead. and Prac. 278 n., Waterman's ed., "Where the statute limits the time of prosecution, the time as averred in the indictment should appear to be within the limit." This is an American note; the only thing in the

text at all connected with the point, is that sentence which Wharton quotes (*vide supra* 695.)

State v. *Rust*, 8 Blackf. 195, "Where the time for, &c.," as above. Relies on 1 Chit. C. L. 223, and *State* v. *G. S.*, 1 Tyler 295.

State v. *G. S.*, 1 Tyler 295. Date in indictment "March 2d one thousand eight." Insensible and of course bad.

State v. *Lassley*, 7 Porter (Ala.) 526, Demurrer for not laying a certain date in one count. Dictum that certainty of time was not necessary. This is not law. Judgment entered on another good count.

State v. *Roach*, 2 Hayw. 526, no day stated. Of course bad.

Roberts v. *State*, 19 Ala. 526, no date laid.

Shelton v. *State*, 1 Stewart & Porter 208. All that is decided is, that under an indictment charging an assault on 10th, evidence is admissible of assaults on 3d and 4th of same month. Nothing is said of Statute of Limitations.

State v. *Bacon*, 7 Ver. 219, no venue. General statement by judge that indictment should give time and place.

State v. *Baker*, 34 Maine 52, allegation was uncertain "on or about a certain day."

Erwin v. *State*, 19 Miss. 306, time omitted.

Cook v. *State*, 11 Geo. 53: Indictment brought September Term 1851. Date May 1st 1851 and divers other days. NISBET, J.: "Any day previous to the finding of the indictment will do, except when time enters into the nature of the offence, and the offence may be proven on any day within the period of limitations dating back from the finding of the bill:" *Hubbard* v. *State*, *vide supra*.

3. *People* v. *Miller*, 12 Calif. 294. Error in entering judgment against prisoner on indictment showing the offence to have been committed more than three years before indictment brought. The verdict was guilty of manslaughter; and Statute of Limitations enacting that "An indictment for any other felony than murder must be found within three years after its commission." TERRY, J.: "It is generally true that every essential fact must be stated in the indictment, and this means every fact material to the offence of which the party may be convicted, and the allegation of a day within the period of limitation is material whenever the offence is subject to limitation: Wharton Am. Cr. Law, pp. 111, 114. * * * It is true that the Statute of Limitations excludes from computation the time the defendant may be out of the state, but the rule is that this exception must be stated in pleading. *Primâ facie* the lapse of time is a good defence, and if the statutory exception is relied on the state should set it up. *This is the rule in civil pleadings in our system*, and it is not less strict in criminal cases. The case in 9 Cow. (*People* v. *Santvoord*), cited by the Attorney-General, seems to be against this view, but that case stands opposed to well settled precedents in English and American courts." The contrary seems to be held in *State* v. *Beckwith*, 1 Stew. 318, *vide supra*; *Shelton* v. *State*, 1 Stew. & Por. 208, *vide supra*; *State* v. *Roach*, 2 Hay. 540, *vide supra*: 1 How. (Miss.) 260: (Date in this case was A.D. 1030, held to be impossible); Wh. Cr. Law, *vide supra*; 1 Chitty Cr. Law, *vide infra*.

Its unqualified language would alone lead us to question the value of this opinion; the fact that most of its authorities do not sustain it, or are not themselves supported by those upon which they in their turn rely, together with the statement, "that this is the rule in civil pleadings in our system," &c., which negatives the rule that in civil cases the Statute of Limitations must be specially pleaded, more than confirm that doubt.

4. *State* v. *Bryan*, 19 (La.) An. 435. Demurrer that indictment did not neg-

ative prescription which on its face had accrued by alleging either that the crime was not discovered or that the prisoner had fled from justice. Demurrer sustained, court relying on two local authorities, which were motions in arrest of judgment.

5. 1 Chitty's Crim. Law 223. "When the time is material, as of the death in case of homicide, or where the time for the prosecution is limited as under 7 Wm. III. c. 3, which provides that no prosecution shall be had for certain treasons therein mentioned unless the bill of the indictment is found within three years after the crime is committed, the time as averred in the indictment should appear to be within the limitation, but it is not necessary to aver that it occurred within that period." Not one of the authorities, as we will show, which are cited for it, sustain this position. They are as follows: *King* v. *Stevens and Agnew*, 5 East 259, indictment under a statute of Geo. III., against certain persons for receiving presents, must show that presents were received during tenure of office. *Held*, that indictment alleging a tenure *until* a certain day, and receipt of presents on that day, sufficient.

1 Saunders 309: Statement of dates necessary in an indictment against one for practising a trade without a seven years' apprenticeship according to statute.

Baynham v. *Matthews*, Fitz. 130; Declaration on promissory note of a certain date: Plea, usury. It was objected to plea that it did not aver that note was given since late act as to usury. Resolved by court, that by date of note it appears so. And by RAYMOND, C. J.: "The plaintiff having declared on a note of special date, could not give in evidence a note bearing a different date. Plaintiff given leave to discontinue." This belongs to the well defined class of cases in which time must be precisely laid because it is a matter of particular description.

Bac. Abr. *Usury* K., no authority, as time is of essence in case of usury.

Gilbert 243—on p. 265 is the only reference to point in question, and is authority the other way, *vide supra* 691, *Lee* v. *Clarke*, 2 East 333; 2 East 362, an authority against the author's proposition if relevant at all.

This it is believed disposes of all the cases cited against the ruling in *United States* v. *Cooke*; and it only remains to consider,

Thirdly. The learned judge's dictum to the effect that time not being of the essence of the crime, the prosecutor in the case even of a Statute of Limitations without any exceptions, might allege a date beyond the statutory period, being at liberty to prove one within that time. Such a statute is of course rare. 7 Wm. III, c. 3, is perhaps the solitary example, and under it there are no authorities on this point, but a reference to *Lowick's Case*, 13 State Trials 267; *Townley's Case*, 18 Id. 486; *Lord Balmerino's Case*, 18 Id. 486, where a question was made on another section of the act than that which prescribes the limitation, it will be seen that the judges seemed to deem it of no consequence what date was laid in indictment; the dates, as a matter of fact, were all within the statutory period; *vide* also East Pleas of Crown, C. 2, s. 60; *Colledge's Case*, 8 St. Trials 262, and *Charnock's Case*, 12 Id. 1378–98.

The result of the foregoing analysis shows that the notion of an indictment being demurrable for laying a time beyond the statutory period, is, with the exception of the loose statement of two or three text writers, of recent and native growth, and we have the very singular spectacle of an American court in this century being asked to sustain a demurrer which in the strictest age of the English common law was regarded as containing only a frivolous objection.

R.